A constitutional crisis in Poland

Ordo Iuris analysis

WARSAW 2023

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- **A constitutional crisis is brewing in Poland caused by the actions of the new government.**
- **The Minister of Justice Adam Bodnar has published a draft decree that would make the rulings of Polish courts subordinate to those of international tribunals.**
- **Meanwhile, the Sejm passed a resolution challenging the validity of election of members of the National Judiciary Council appointed in the period of March 2018 to May 2022.**
- **The judges are supposed to also undergo an „test of independence" that could undermine their appointment by the President of Poland and subordinate them to political parties.**
- **There was also an unlawful attack on the public media and unlawful dismissal of the Management Boards and Supervisory Boards of the Polish TV (TVP), Polish Radio and Polish Press Agency (PAP).**
- **The Warsaw District Court, meanwhile, convicted MPs Mariusz Kaminski and Maciej Wąsik in the case in which they were previously pardoned by the President of Poland.**

On December 13, 2023, a new Council of Ministers was appointed in Poland, under the leadership of Mr. Donald Tusk. Acting based on the resolutions of the Sejm, i.e., the lower chamber of the Parliament of the Republic of Poland, the new Polish government, started undertaking unlawful actions undermining the foundations of a democratic rule of law, and intended to constitute a certain kind of "transitory period" order. The term "transitory period" was used in the resolution of the Sejm of the Republic of Poland of December 19, 2023 on the restoration of the rule of law and the impartiality and integrity of the public media and the Polish Press Agency.

The doctrine of justice of the transitory period was referred to by the current Justice Minister Adam Bodnar in an article published in *Gazeta Wyborcza*. In the practice of the current government, it is supposed to consist in deviating from the normal principles of a law-abiding and democratic state and in undertaking actions without legal grounds, which are based on the use of violence (as exemplified by the battery of one of the Members of Parliament (MPs) who intervened in defense of the public media) and subersive actions (such as shutting off the signal of the Polish television TVP Info station).

1. THE ATTEMPT TO DEPRIVE THE POLISH JUDICIARY OF ITS SOVEREIGNTY AND TO SUBORDINATE IT TO THE RULINGS OF EUROPEAN TRIBUNALS

In 2017, the then ruling United Right government introduced into Polish courts the institution of "coordinators for international cooperation and human rights" in criminal and civil cases. The justification for the amendment stressed that this was done "in order to improve the practice of exchanging information and experience regarding international cooperation and human rights".

Meanwhile, Poland's new Minister of Justice and Attorney General Adam Bodnar decided to use the institution of coordinators for something completely different: for instructing judges on how they should rule, claiming that the National Judiciary Council is operating illegally, as it was supposed to be elected based on the provisions introduced by the law of December 8, 2017, which is supposedly confirmed by the rulings of the Court of Justice of the European Union and the European Court of Human Rights.

Already on his very first day in office, on December 13, 2023, the Minister sent a letter to the coordinators in which he interpreted that the coordinators have the obligation to "pay special attention to the case law [of the CJEU and ECHR] regarding the status of persons appointed to judicial positions with the participation of the National Judiciary Council [as of 2017]", from Articles 16b and 16d of the *Law of July 27, 2001 on the System of Common Courts*, according to which coordinators are obliged to "inform judges about relevant current case law of international bodies". He also announced that " in the near future, the Ministry of Justice will be holding seminars and training sessions on the importance of CJEU and ECHR case law concerning the independence of the judiciary".

The 2017 amendment changed the method of appointment of the 15 judges-members of the NJC. Until then, they were selected by the judicial assemblies, and they are elected by the Sejm ever since. The Article 187 of the Constitution, which regulates this area, does not specify who elects the judges-members of the NCJ, but states that the method of selecting the members is determined by parliamentary bill. This change was opposed from the beginning by many judges maintaining in contradiction to the letter of the Polish Constitution, that these 15 judge-members of the NJC must be elected by judges. Thus, the new Minister of Justice and Attorney General Adam Bodnar completely ignored the position of the Polish Constitutional Tribunal, which in its judgment of March 25, 2019, ref. K 12/18, confirmed the conformance of the provisions of the *Law of December 8, 2017* with the Constitution as well as with the well-established line of juris-

prudence maintaining that the act of appointment to the Office of a Judge by the President of the Republic of Poland is final and is not subject to any kind of review, including by courts and tribunals (see: the verdict of the Constitutional Tribunal of March 4, 2020, P 22/19, the judgment of the Constitutional Tribunal of December 11, 2023, Kp 1/23).

In addition, on December 15, 2023, Adam Bodnar published a draft decree adding a new paragraph 118a to the Rules of Procedure of Common Courts, according to which "**during the preparation of verdicts and justifications the European Union law shall be taken into cosideration**, in particular Article 19 of the Treaty on European Union" [regarding the CJEU], as well as "acts of the international law binding on the Republic of Poland", in particular **Article 6 of the European Convention on Human Rights, "taking into account the jurisprudence of the CJEU and the ECHR when interpreting them"**.

„Bodnar's Decree" – as the draft regulation has already been dubbed – constitutes a flagrant violation of Article 178(1) of the Polish Constitution, according to which "in the exercise of their office, Judges shall be independent and subject only to the Constitution and statutes". Therefore, it is forbidden to impose obligations on judges regarding adjudication and justification of rulings by means of decrees. *Bodnar's decree* also contradicts the Constitutional Tribunal's judgment of October 7, 2021 (ref. K 3/21), which stated that Article 19 of the Treaty on European Union, cited by Bodnar is incompatible with the Polish Constitution, to the extent that it would authorize a court to review the independence of judges appointed by the President of the Republic of Poland.

2. QUESTIONING THE STATUS OF THE NATIONAL JUDICIARY COUNCIL

Various circles associated with the current ruling coalition are attempting to challenge the status of the National Judiciary Council, as part of a broader campaign to allegedly "restore the rule of law". The result of these efforts is a resolution adopted by the Sejm on December 20, 2023, stating that the Sejm's resolutions from March 2018 to May 2022 regarding the selection of members of the NJC were adopted in flagrant violation of the Polish Constitution. Moreover, in the resolution, the Sejm calls on the thus elected members of the NJC to immediately cease their activities in this body.

It should be reiterated that under Article 186(1) of the Polish Constitution, the National Judiciary Council shall safeguard the independence of courts and judges. According to Article 187 (1) of the Polish Constitution, the National Judiciary Council consists of:

1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and the representative appointed by the President of the Republic;
2) 15 judges chosen from the judges of the Supreme Court, common courts, administrative courts and military courts;
3) 4 members chosen by the Sejm from its Deputies and 2 members chosen by the Senate from the Senators.

The aforementioned constitutional provision does not indicate at any point that the fifteen members chosen from among judges of the Supreme Court, common courts, administrative courts and military courts are to be elected by the judicial community itself. Indeed, the National Judiciary Council does not constitute a form of professional self-government (cf. Article 17(1) of the Polish Constitution). Moreover, a *bona fide* interpretation of the cited provision of the Constitution of the Republic of Poland leads to the obvious conclusion that the authors of the constitution deliberately did not specify the method of selecting the fifteen members of the NJC

referred to in Article 187(1)(2) of the Constitution of the Republic of Poland, leaving the ordinary legislators the freedom to do so. This was confirmed by the judgments of the Constitutional Tribunal of June 20, 2017 (ref. K 5/17) and of March 25, 2019 (ref. K 12/18). Therefore, nothing prevents the current ruling coalition from amending the law on the National Judiciary Council to the extent indicated. In accordance with the *lex retro non agit* rule derived from the principle of a democratic state under the rule of law, such changes could take effect from the next term of office of the designated members of the NCJ. On the other hand, it is impermissible to attempt to force changes in the composition of the NCJ, which is what the resolution adopted by the Sejm of the Republic of Poland is intended to achieve (similarly to the one adopted regarding the public media).

3. "TEST OF INDEPENDENCE" – A MEANS TO MAKE JUDGES DEPENDENT

The reason for the controversy and confusion regarding the issue of the legality of the functioning of the National Judiciary Council is the unfounded claims of opposition politicians and some representatives of the legal doctrine, according to which, after the reforms carried out in 2017 by the then ruling party, this body allegedly lost the attribute of independence.

The new rules for the selection of part of the NCJ, according to politicians of the then opposition and today's ruling majority, were carried out in a manner inconsistent with the Constitution. As a result, they claim, the judges appointed by the President with the participation of the NJC, which in their view was inappropriately staffed, did not acquire the status of a judge and the judges promoted in the process must return to their previous positions and take part in new, "legal" competitions. What's more, some proponenets of the view go even further, calling for the declaration of all verdicts issued with the participation of judges appointed since 2018 as as null and void.

In this context, there have been proposals, for several years, to introduce a so-called "test of independence", which would evaluate more than 2,500 judges appointed to their positions after the change in the rules of the NCJ. This test would allow for "verification" that a given judge meets the requirements of impartiality and independence. The demand for the establishment of a test of independence appeared, among other things, in a recently publicized draft regulation of the Minister of Justice.

Mechanisms that allow for the status of some judges to be questioned by other judges (appointed in an earlier period) based on underdefined criteria constitute a flagrant violation of the guarantees of the independence of judeges and courts. It should be stressed that under Article 178(1) of the Constitution of the Republic of Poland, in the exercise of their office judges are independent and subject only to the Constitution and statutes. In turn, Article 180(1) of the Polish Constitution stipulates that judges are irremovable, which is a fundamental guarantee of judicial independence. This guarantee is therefore extended to judges, i.e., pursuant to Article 179 of the Constitution of the Republic of Poland, persons appointed by the President to the office of judge at the request of the National Judiciary Council. As emphasized in jurisprudence, the appointment of a judge is an act of constitutional law involving the formation of the personnel of the judiciary authority, which constitutes a discretionary decision of the President, falling within the scope of his personal prerogative (decision of the Supreme Administrative Court of December 7, 2017, ref. I OSK 857/17).

The appointment of a judge is a prerogative of the President, and a possible hypothetical defect in the staffing of the National Judiciary Council is not a sufficient basis for challenging the status

of judges appointed by the President. This is confirmed by the jurisprudence of the Supreme Administrative Court – a body whose proper legitimacy has never been questioned and whose judges are not those directly involved in the dispute over the status of judges of common courts and the Supreme Court. All of the cited rulings have been issued after the legal changes to the way in which a part of the National Judicial Council was staffed:

"In view of the previous acts of appointment of judges and assessors of administrative courts from among candidates presented by the National Judiciary Council formed under the new rules, who exercise the administration of justice, and issue judgments on behalf of the Republic of Poland, it is impossible to accept, that the alleged defectiveness of the Council, however it may impact the assessment of the correctness of judicial appointments, is a sufficient premise for declaring the judgments issued by these judges to be null and void or defective. Even if one were to consider that the body submitting the application for appointment in the form of the current National Judiciary Council did not meet the constitutional requirements, it should be recognized that the application was submitted, it was subject to judicial review, and, most importantly, the President of the Republic of Poland, within the authority granted to him, made a substantive assessment of it, appointing the person in question to the position of judge or assessor of an administrative court" – Ruling of the Supreme Administrative Court of September 15, 2022, ref. III OZ 493/22.

„A judge of an administrative court or a judicial assessor in a provincial administrative court, appointed to hold office by the President of the Republic of Poland, is a judge of the Republic of Poland, and a European judge within the meaning of Articles 2 and 19(1) and 6(1)(3) of the Treaty on European Union (Journal of Laws of 2004, No. 90, item 864/30, as amended) in conjunction with Article 47 of the Charter of Fundamental Rights (Official Journal of the EU C 303 of December 14, 2007, p. 1), as well as Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950 (Journal of Laws of 1993, No. 61, item 284, as amended), also when the procedure preceding its appointment may have been flawed. In terms of the EU and Convention standards of the right to a court trial, it can be considered that if a judge or judicial assessor who meets the constitutional standards of sovereignty, independence and impartiality sits on the bench of a provincial administrative court, even if he was appointed by the President at the request of the National Judicial Council in the composition formed by the law of December 8, 2017, then such a court should be considered a European court within the meaning of Articles 2 and 19(1) of the Treaty on European Union, Article 6(1)-(3) of the TEU in conjunction with Article 47 of the Charter of Fundamental Rights and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms" – Rulling of the Supreme Administrative Court of November 16, 2021, ref. III FSK 4255/21.

„If an administrative court judge or a judicial assessor has been appointed to an office by the President of the Republic of Poland, he or she is a judge of the Republic of Poland and a European judge, even if the procedure preceding his or her appointment may have been flawed" – Ruling of the Supreme Administrative Court, November 4, 2021, III FSK 3626/21.

„In the nomination procedure for judges, the President does not have a mere approving role, but can oppose any nomination in a situation where he considers that the nomination of a person to the position of judge would contradict the constitutional values he was appointed to protect. The power to appoint judges is a personal power of the President, and the Constitution knows of no subjective right of access to judicial service. This prejudges the inability of the administrative courts to exercise control over acts related to such a procedure. In a situation where the

President has found no grounds for refusing to appoint a judge, the Supreme Administrative Court, in proceedings to exclude a judge, cannot assess the correctness of the appointment of that judge. The institution of the exclusion of a judge does not serve to control the actions of the President taken within the framework of his constitutional powers set forth in Article 179 and Article 144(2) and (3)(17) of the Constitution" – Ruling of the Supreme Administrative Court of January 27, 2020, ref. I OSK 1917/18.

It follows from the cited jurisprudence, as well as from the content of the Constitution of the Republic of Poland, which is the highest and directly applicable law of the Republic of Poland, that whether a person is a judge is determined solely by the act of appointment by the President. No body has the authority to review presidential competence in the indicated scope. Any attempt to undermine the status of judges appointed by the President constitutes a blatant attack on judicial independence. It would constitute unlawful pressure on a significant portion of Polish judges, while undermining the foundations of the principle of a democratic state ruled by law.

4. VIOLATION OF THE INDEPENDENCE OF THE CONSTITUTIONAL TRIBUNAL

The Constitutional Tribunal is a judicial authority with the purpose of, among other things, assessing the compliance with the Constitution of other normative acts and eliminating unconstitutional acts from the legal system. Judges of the Constitutional Tribunal are elected by the Sejm and then take an oath before the President. The government of Donald Tusk, citing rulings of the European Court of Human Rights, which do not constitute sources of law in the Polish legal order, announced that it will question the status of some of the judges of the Constitutional Tribunal and invalidate the rulings issued by them. This is to be done through a resolution of the Sejm, which is an act which also has no universally binding force and as a rule, is not subject to constitutional control. The status of a Constitutional Tribunal judge is regulated by the statute, which stipulates that a person elected by the Sejm becomes a judge and assumes an official capacity after taking an oath before the President. From that moment on, a judge of the Constitutional Tribunal becomes independent in the exercise of his or her office and is subject only to the Constitution. The Sejm has no authority to verify the status of a Constitutional Tribunal judge after his taking the oath of office.

During its first days in office, Donald Tusk's government has already managed to demonstrate its attitude toward the Constitutional Tribunal in undermining the status of Constitutional Tribunal judges by making an annotation by the the publishing authority (of the Journal of Laws issued by the Prime Minister) to the recent Constitutional Tribunal rulings saying "According to the judgments of the European Court of Human Rights in the cases of Xero Flor in Poland Sp. z o.o. vs. Poland, dated 7.05.2021, complaint no. 4907/18; Walesa vs. Poland, dated 23.11.2023, complaint no. 50849/21; M.L. vs. Poland, dated 14.12.2023, complaint no. 40119/21, the Constitutional Tribunal is deprived of the characteristics of a tribunal established by statute when an unauthorized person sits in its bench. According to these rulings, the published judgment was issued in a quorum established in violation of the fundamental principle applicable to the election of judges of the Constitutional Tribunal and consequently violating the essence of the right to a court trial established by law". It should be pointed out that the annotation to the judgments

of the Constitutional Tribunal unlawful, because official journals publish acts in the form signed by the authorized entity (here, the judges of the Constitutional Tribunal), and any interference with the content of the text to be promulgated is not permitted, especially without the consent of the authorized entity. Once again, it should be emphasized that Polish law does not provide for the possibility of annotating legal acts and rulings published in the official journal with any kind of annotation, which means that the Article 7 of the Constitution, which stipulates that “The organs of public authority shall function on the basis of, and within the limits of, the law”, was clearly violated.

5. UNLAWFUL ATTACK ON PUBLIC MEDIA

An unlawful attack on public media took place based on a resolution of the Polish Sejm of December 19, 2023 on the restoration of legal order and the impartiality and integrity of public media and the Polish Press Agency. On the same day, the acting Minister of Culture and National Heritage, Colonel Bartlomiej Sienkiewicz, as the body exercising the ownership rights of the State Treasury (which holds 100% of the shares in the Companies), acting under the provisions of the Commercial Companies Code, dismissed the existing Chief Executives of the boards of Polish TV (Telewizja Polska S.A.), Polish Radio (Polskie Radio S.A.) and Polish Press Agency (Polska Agencja Prasowa S.A.), as well as the supervisory boards of these companies. The Minister appointed new supervisory boards in their place, which appointed new management boards of the companies. The Minister's actions were undertaken in violation of statutory provisions.

The Minister justified his decisions with the provisions of the aforementioned resolution of the Sejm, which called on the State Treasury, represented by the ownership body of the companies carrying out the public mission of radio and television broadcasting and the Polish Press Agency S.A., to take immediate corrective measures to depoliticize the public media until appropriate legislative solutions are enacted and implemented.

In justifying its decision, the Sejm of the Republic of Poland referred, first, to the failure to implement the Constitutional Tribunal's December 13, 2016 ruling (ref. K 13/16), erroneously attributing to the ruling that it declared unconstitutional the entrustment of the appointment and dismissal of public media authorities to the National Media Council, while the CT judgment (K 13/26) regarded **depriving the National Broadcasting Council of participation in these processes and transferring these powers to the competent minister**. Secondly, the resolution pointed to the flawed appointment of the authorities of the companies carrying out the mission of the public media and the Polish Press Agency S.A. following „unconstitutional" amendments to, among others, the Broadcasting Act of December 29, 1992, and the Polish Press Agency Act of July 31, 1997. It should be pointed out, however, that the provisions of the Act on the National Media

Council have so far not been the subject of a Constitutional Tribunal ruling that would overrule them in any respect. Hence, they enjoy the presumption of constitutionality. It should also be recalled that the Sejm does not have the authority to assess the constitutionality of laws – in the event that MPs are convinced that a particular piece of legislation raises doubts as to its compliance with the Polish Constitution, they should use their powers within the legislative process.

In response to the unprecedented and misleading resolution of the Sejm, the position was taken by President of the Republic of Poland Andrzej Duda in a letter dated December 20, 2023, addressed to the Prime Minister. The President first recalled that the sources of universally binding law are, according to Article 87 of the Constitution, the Basic Law, statutes, ratified international agreements and regulations. Since this catalog is closed, resolutions of the Sejm do not constitute acts of universally binding law, i.e., they have no legal force, and no bodies can take action against citizens based on them.

In addition, the President of the Republic recalled that the body with jurisdiction over the appointment and dismissal of the members of the governing bodies of public broadcasting units and the Polish Press Agency is exclusively the National Media Council (Article 2(1) of the Act of June 22, 2016 on the National Media Council). Moreover, the judgment of the Constitutional Tribunal of December 13, 2016, cited in the Sejm's resolution in question, found only the provisions of the Act of December 30, 2015, amending the Broadcasting Act, to be unconstitutional. It should be noted that the judgment in question did not declare the Law on the National Media Council unconstitutional. Any change in this regard requires the intervention of the legislature and the enactment of new legislation.

In the context of the unlawful actions of the Polish Government in preventing the normal functioning of the public media, it should also be pointed out that:

- according to Article 8 (1) of the Act of July 31, 1997 on the Polish Press Agency, members of the PAP Board of Directors, including the Chairman of the Board, are appointed and dismissed by the National Media Council. Consequently, the application of the provisions of the Commercial Companies Code invoked by Colonel Sienkiewicz is excluded. This follows not only from the conflict of legal rules (*lex specialis derogat legi generali*), but also from the literal content of the Act on the Polish Press Agency, which provides in Article 5 that the Commercial Companies Code applies to PAP only to the extent not otherwise regulated by the content of the Act on the Polish Press Agency;
- the decision to dismiss the Supervisory Board and the Management Board of Telewizja Polska S.A. is inconsistent both with Article 2(1) of the Act on the National Media Council, but also with the company's articles of association. According to § 13 of the Articles of Association of Telewizja Polska S.A., members of the Management Board, including its President, are appointed and dismissed by the National Media Council;
- The actions of the Minister of Culture and National Heritage, Colonel Sienkiewicz, result in the discontinuation of public television channels: TVP Info, TVP 3 (regional broadcasters), and TVP World. As a result, these entities are not fulfilling their obligations under their contracts (for example, in terms of presenting commercials). This exposes Polish Television to huge financial losses, and thus the actions of

the Ministry of Culture and National Heritage and all those allegedly appointed to the TVP authorities are actions to the detriment of the company, which may even involve criminal liability;

- outsiders were allowed to work in the buildings of Polish Television - without any legal basis, and therefore in violation of labor laws and health and safety standards. In turn, TVP's employees and contractors were not allowed to work, which may also entail financial liability for the company, and therefore constitutes an act to its detriment.

Acting in accordance with the law should include, first of all, implementation of the Constitutional Tribunal's ruling of December 13, 2016, i.e. amending the law to the extent indicated by the Court. Only after that, could possible action be taken regarding the management and supervisory boards.

The alleged legal basis for the action of the Minister of Culture and National Heritage has been challenged by a group of deputies to the Constitutional Tribunal, which will hear the case (ref. K 29/23) on January 16, 2024, at: 10 a.m. At the same time, the Constitutional Tribunal issued a protective order, ordering the Minister of Culture and National Heritage to refrain from making changes to the boards of directors and supervisory boards of public broadcasting companies, but this was ignored.

6. CONVICTION OF TWO POLISH MPS IN VIOLATION OF PRESIDENTIAL ACT OF CLEMENCY AND PRINCIPLE OF SEPARATION OF POWERS

On December 20, 2023, The District Court in Warsaw, as a court of second instance, issued a verdict sentencing former Chief of Central Anti-Corruption Bureau, Mariusz Kaminski and his deputy Michal Wąsik to two years in prison. Kaminski and Wąsik were elected as deputies of the 10th term of the Polish Parliament in the October 15, 2023 parliamentary elections.

A final sentence of imprisonment for an intentional crime prosecuted by public indictment means the expiration of a deputy's mandate (which follows from Article 247 § 1(2) of the Polish Election Code in conjunction with Article 99(3) of the Polish Constitution). Such expiration is declared by order of the Speaker of the Sejm (Article 249 § 1 of the Election Code), against which MPs may appeal to the Supreme Court (Article 250 § 1 of the Election Code).

It should be noted, however, that the same District Court that convicted Kaminski and Wąsik on December 20, 2023, discontinued the appeal proceedings against them on March 30, 2016. This had been initiated as a result of their appeal against a non-final judgment of the district court (court of first instance), after the President of the Republic of Poland in 2015 applied the right of clemency to the convicted persons, which is his prerogative enshrined in Article 139 of the Polish Constitution.

The District Court's decision on remission was overturned by the Supreme Court on June 6, 2023 (ref. II K 96/23). The Supreme Court, after reviewing the cassation appeals filed against Kaminski and Wąsik, ruled that the President can only exercise the right of clemency against those convicted with a final judgment, and sent the case back to the District Court in Warsaw for reconsideration.

However, the District Court's conviction and the Supreme Court's ruling of June 6, 2023, ref. II K 96/23 were inadmissible in light of the Constitutional Tribunal's ruling of July 17, 2018, ref. K 9/17, according to which the President's constitutional prerogative in the form of the right of clemency can also be exercised after a non-final verdict by the court of first instance, while the act of clemency itself constitutes a negative premise for further criminal proceedings.

In addition, in its June 26, 2019, K 8/17 judgment, the Constitutional Tribunal ruled that the filing and consideration of a cassation appeal to the detriment of a defendant, when the cassation challenges the correctness of the President of the Republic's application of an act of clemency, violates constitutional provisions on the right of clemency and the separation of powers. In the judgment, the Tribunal stressed that the constitutional right of clemency, as a prerogative of the

President of the Republic, cannot be modified by sub-constitutional level acts (i.e., by the legislature and other lawmaking entities), either by the activities of the judiciary or by other organs of the executive branch.

The President of the Republic of Poland maintains that the 2015 pardons of Kaminski and Wąsik are valid and remain legally binding, and that the District Court's conviction is a violation of the Constitution.